Nestlé-Dreyer's Grand Ice Cream, Inc. *and* International Union of Operating Engineers Local 501, AFL–CIO. Case 31–CA–074297

November 5, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND JOHNSON

On May 18, 2012, the National Labor Relations Board issued a Decision and Order in this proceeding, which is reported at 358 NLRB No. 45. Thereafter, the Respondent filed a petition for review in the United States Court of Appeals for the Fourth Circuit, and the General Counsel filed a cross-application for enforcement.

At the time of the Decision and Order, the composition of the Board included three persons whose appointments to the Board had been challenged as constitutionally infirm. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning,* 134 S.Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid. Thereafter, the court of appeals remanded this case for further proceedings consistent with the Supreme Court's decision.

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed by the Union on February 9, 2012, the Acting General Counsel issued the complaint on March 27, 2012, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to recognize it and bargain following the Union's certification in Case 31–RC–66625. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer, admitting in part and denying in part the allegations in the complaint, and asserting affirmative defenses.

On April 17, 2012, the Acting General Counsel filed a Motion for Summary Judgment. On April 18, 2012, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain, but contests the validity of the certification on the basis of its contention in the underlying representation proceeding that the bargaining unit is inappropriate.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).[1] Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a Delaware corporation with a facility located in Bakersfield, California, has been engaged in the business of producing ice cream and frozen dairy products.

During the 12-month period ending January 2012, the Respondent, in conducting its business operations described above, derived gross revenues in excess of $500,000 and sold and shipped from its Bakersfield, California facility goods valued in excess of $50,000 directly to points outside the State of California.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union, International Union of Operating Engineers Local 501, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the representation election held on January 4, 2012, the Union was certified on January 13, 2012, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

[1] Member Johnson did not participate in the underlying representation proceeding and expresses no opinion whether it was correctly decided. He agrees that the Respondent has not presented any new matters that are properly litigable in this unfair labor practice case.

> Included: All full-time and regular part-time maintenance employees employed by Respondent at its facility located at 7301 District Boulevard, Bakersfield, CA.
>
> Excluded: All other employees, production employees, quality assurance employees, office and plant clerical employees, professional employees, persons employed by other employees, QA Receiving Coordinator, Microbiologist, Shipping Assistant, Input/Output Operator, Receiving Coordinator, Cycle Counter, Inventory Clerk, Accounting Specialist, Safety and Environment Technician, H.R. Administrative Assistant, Maintenance Scheduler, guards and supervisors as defined in the Act, as amended.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

B. Refusal to Bargain

Angela D. Green has held the position of the Respondent's vice president, human resources, and has been an agent of the Respondent within the meaning of Section 2(13) of the Act.

On about January 19, 2012, the Union, by Christopher A. Brown, requested that the Respondent bargain collectively with it as the exclusive collective-bargaining representative of the unit.

Since that date, the Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit.

We find that this failure and refusal constitutes an unlawful failure and refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing since about January 19, 2012, to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co*., 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co*., 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Nestlé-Dreyer's Grand Ice Cream, Inc., Bakersfield, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with International Union of Operating Engineers Local 501, AFL–CIO, as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> Included: All full-time and regular part-time maintenance employees employed by Respondent at its facility located at 7301 District Boulevard, Bakersfield, CA.
>
> Excluded: All other employees, production employees, quality assurance employees, office and plant clerical employees, professional employees, persons employed by other employees, QA Receiving Coordinator, Microbiologist, Shipping Assistant, Input/Output Operator, Receiving Coordinator, Cycle Counter, Inventory Clerk, Accounting Specialist, Safety and Environment Technician, H.R. Administrative Assistant, Maintenance Scheduler, guards and supervisors as defined in the Act, as amended.

(b) Within 14 days after service by the Region, post at its facility in Bakersfield, California, copies of the attached notice marked "Appendix."[2] Copies of the notice, on forms provided by the Regional Director for Region

[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 19, 2012.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 31 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. November 5, 2014

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Harry I Johnson, III, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with International Union of Operating Engineers Local 501, AFL–CIO, as the exclusive collective-bargaining representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following bargaining unit:

Included: All full-time and regular part-time maintenance employees employed by us at our facility located at 7301 District Boulevard, Bakersfield, CA.

Excluded: All other employees, production employees, quality assurance employees, office and plant clerical employees, professional employees, persons employed by other employees, QA Receiving Coordinator, Microbiologist, Shipping Assistant, Input/Output Operator, Receiving Coordinator, Cycle Counter, Inventory Clerk, Accounting Specialist, Safety and Environment Technician, H.R. Administrative Assistant, Maintenance Scheduler, guards and supervisors as defined in the Act, as amended.

NESTLÉ-DREYER'S GRAND ICE CREAM, INC.

The Board's decision can be found at www.nlrb.gov/case/31-CA-074297 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.